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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1051**

Dana Jo Field,
Appellant,

vs.

Bastian Vernon Van Hofwegen, et al.,
Respondents.

**Filed September 2, 2008
Affirmed
Toussaint, Chief Judge**

Hennepin County District Court
File No. 27-CV-05-017235

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Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant Dana Jo Field challenges the district court's denial of her motion for a new trial, arguing that she is entitled to a new trial as a sanction for the alleged discovery misconduct of counsel for respondents Bastian Vernon Van Hofwegen and Metropolitan Council. Because appellant waived her new-trial argument by failing to object to the alleged misconduct at trial, we affirm.

DECISION

Appellant filed a complaint against respondents, alleging that Van Hofwegen acted negligently in causing a collision between the Metropolitan Transit bus he was driving and her vehicle. At trial, the jury found that neither party was negligent. Appellant then moved for a new trial. She did not identify the legal basis for her motion but argued that respondents' counsel engaged in discovery misconduct by failing to produce the tape-recording of an interview respondents' counsel's paralegal conducted with a nonparty witness and by failing to explain that two written statements signed by that witness were drafted by the paralegal.¹

The district court determined that "the likely basis for [appellant's new-trial] motion is a claim of spoliation of evidence pursuant to Rule 59.01(a) and (b)." *See Minn.*

¹ The paralegal's posttrial affidavit states: the dictaphone she used to record the interview was not working properly; she handwrote a short statement at the interview out of concern that she would be unable to contact the witness again because of the witness's living situation, and the statement was reviewed and signed by the witness; the tape-recording of the interview "was of very poor quality" and was discarded; and the paralegal typed a longer statement based on the tape-recording and mailed it to the witness, who reviewed and signed the typed statement and returned it to the paralegal.

R. Civ. P. 59.01. In its order denying appellant's motion, the district court found that appellant did not object to the alleged discovery misconduct when she became fully aware of it at trial and concluded that because appellant did not object, "it was inappropriate for [appellant] to raise it for the first time on a new trial motion." The district court also concluded that any prejudice appellant might have suffered from the alleged misconduct could have been remedied by a timely objection and motion to strike the witness's testimony and that any prejudice was in fact remedied by appellant's counsel's closing argument that the witness was not credible because of the alleged spoliation.

Because we generally do not consider on appeal matters not argued to and not considered by the district court, our review of the district court's decision is limited to whether appellant is entitled to a new trial under Minn. R. Civ. P. 59.01 (a) and (b). *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We review the district court's denial of appellant's new-trial motion for a clear abuse of discretion. *See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 476-77 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

Minn. R. Civ. P. 59.01 provides in pertinent part:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

- (a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;
- (b) Misconduct of the jury or prevailing party

"The paramount consideration in determining whether a new trial is required in cases

alleging misconduct is whether prejudice occurred. The prejudice must be such that it affected the outcome of the case.” *Lake Superior Ctr. Auth.*, 715 N.W.2d at 479 (citation omitted).

Appellant contends that the district court abused its discretion by denying her new-trial motion. We disagree. Generally, a party may not raise an issue for the first time in a new-trial motion. *Ellingson v. Burlington N. R. R.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987); *see Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (“issue first raised in a post-trial motion is not raised in a timely fashion”), *review denied* (Minn. Oct. 15, 2002). When “there is no objection at the time the evidence is offered, no claim of surprise at trial and no request for a continuance, trial courts are well within their discretion to deny a motion for a new trial.” *Dostal v. Curran*, 679 N.W.2d 192, 195 n.3 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. July 20, 2004).

At trial, upon learning of the alleged discovery misconduct while cross-examining the nonparty witness, appellant did not object to the witness’s testimony, move to strike the witness’s testimony or sanction respondents, or make any other indication that she disapproved of respondents’ counsel’s conduct during discovery. Instead, appellant’s counsel cross-examined the witness on the basis of the witness’s written statements and argued to the jury that respondents’ alleged spoliation of the tape-recording bore upon the credibility of the witness and respondents’ entire case.

At oral argument on appeal, appellant’s counsel stated that he made a tactical decision not to object to the witness’s testimony and chose instead to argue the alleged

misconduct to the jury as an issue of credibility. By failing to object or move to sanction respondents at trial, appellant's counsel waived appellant's posttrial argument for a new trial. *See Fifer v. Nelson*, 295 Minn. 313, 317, 204 N.W.2d 422, 424 (1973) ("Plaintiff may not remain silent throughout the trial, in anticipation of a favorable verdict, and raise the issue of surprise for the first time in the motion for a new trial." (quotation omitted)).

Even if respondents' discovery conduct constituted misconduct and appellant objected to it at trial, appellant has not shown that she was prejudiced. The "admission of evidence that is cumulative or is corroborated by other competent evidence will be deemed harmless and will not warrant a new trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006). Here, the substance of the witness's testimony was cumulative of and corroborated by the testimony of Van Hofwegen, a city traffic engineer, and two other nonparty witnesses. Additionally, appellant argued the alleged misconduct to the jury as impacting the witness's credibility, which further reduced any potential prejudice to appellant.

Because appellant waived her argument for a new-trial when she failed to object to the alleged discovery misconduct at trial and because appellant has not shown that she was prejudiced by the alleged misconduct, we conclude that the district court did not abuse its discretion.

Affirmed.